**SAW YEW CHOY**

**v.**

**PP**

HIGH COURT MALAYA, SHAH ALAM
KANG HWEE GEE J
[NOTICE MOTION NO: 44-14-99]
31 DECEMBER 1999

***CRIMINAL PROCEDURE:*** *Appeal - Petition of appeal - Application to enlarge time to file petition due to failure to file it within time prescribed - Whether failure to file petition within time prescribed a strict requirement - Criminal Procedure Code, s. 307(ix) - Whether court could allow appeal under s. 310 - Whether default of counsel a ground for consideration - Whether any merits in appeal*

The appellant was tried and convicted by the Sessions Court upon the charge of cheating under s. 420 of the Penal Code. He was sentenced to a term of imprisonment of one year and one stroke of whipping. The Sessions Court allowed a stay of the execution pending an appeal to the High Court against both the conviction and sentence.

The applicant by his counsel ('the counsel') filed a notice of appeal but failed to file the petition of appeal thereafter. In this instance, the applicant applied to enlarge the time for filing the petition of appeal under s. 310 of the Criminal Procedure Code ('CPC'). In his affidavit, the applicant blamed the counsel for failing to file the petition of appeal after having filed the notice of appeal. Apart from that, it was submitted that since the public prosecutor had not filed any affidavit in opposition to the applicant's motion, whatever said in the latter's affidavit should be accepted as truth and therefore this motion should be allowed.

**Held:**

**[1]** The court's powers under s. 310 CPC are purely discretionary and no hard and fast rule should be laid down for its exercise except for the sole purpose of meting out substantial justice. The inadvertence and incompetence of solicitors could be a ground of consideration for a judge when exercising his discretion in allowing or disallowing the application. Precedents, however, indicate that the requirement of s. 307(ix) CPC has always been strictly applied and courts are generally reluctant to exercise its power to grant an enlargement of time under s. 310 unless there are compelling reasons to do so.

**[2]** The catch phrase "in order that substantial justice may be done in the matter" in s. 310 encompasses not merely substantial justice to the convicted person but also substantial justice to "society at large on whose behalf the public prosecutor acts" [*Jumari bin Mohamed v. Public Prosecutor*].

**[3]** Under sub-s. (ix) of s. 307 CPC if a petition of appeal is not lodged within the time prescribed, the appeal is deemed to be withdrawn and the trial court shall enforce its sentence or order if any stay of execution has been granted. Thus, time is of the essence.

**[4]** A person who had appointed a counsel to act for him in a court of law should not be heard later to say that he ought to be excused from his counsel's act or omission. When a person retains a counsel to act for him, under agency law, the acts of his counsel is imputed on to him.

**[4a]** The default of counsel can be a ground for consideration but it is not a ground at all costs. In order that substantial justice can be done, it will be necessary to adopt a stringent approach and to accept the default of counsel as an excuse only when one can be absolutely certain that the applicant is completely free from blame.

**[4b]** The best person to verify the fact under the circumstances was the counsel himself. The applicant's bare averment that he was unable to find the counsel was unacceptable. Rather the failure to obtain from the counsel a deposition to verify the appellant's claim left open the question of whether the applicant knew of any other reason which might not be in favour of the applicant.

**[5]** There was no contest of affidavits between the applicant and the public prosecutor in this motion. It was the applicant who was desirous of having the time for filing his petition of appeal extended. It followed therefore that the onus was solely upon him to satisfy the court that "substantial justice" required that his motion be granted whether or not the public prosecutor filed any affidavit to oppose.

**[6]** Apart from the question of blameworthiness, there was a contumelious delay on the part of the appellant to pursue his appeal.

**[7]** Having perused through the bundle containing the notes of evidence and the grounds of decision of the Sessions Court, there was hardly any merit in the appeal. Even if the applicant's motion was allowed he was unlikely to succeed in his appeal as there were enough materials for his conviction.

*[Motion dismissed.]*

**Case(s) referred to:**
*Ishak Shaari v. PP [1997] 5 MLJ 28* ***(refd)***
*Jiva anak Nawes v. PP [1992] Mallal's Digest of Malaysian and Singapore Case Law, vol 5, 498* ***(refd)***
*Jumari Mohamed v. PP [1982] 1 MLJ 282* ***(refd)***
*Kesavan Senderan v. PP [1999] 1 CLJ 343* ***(refd)***
*Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396* ***(refd)***
*Munusamy v. PP [1987] 1 MLJ 492* ***(refd)***
*Overseas Investment Pty Ltd v. Anthony William O' Brien & Anor [1988] 3 MLJ 332* ***(dist)***
*Ti Chuee Hiang v. PP [1995] 2 MLJ 433* ***(refd)***
*Veerasingam v. PP [1958] MLJ 76* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 307(ix), 310
Evidence Act 1950, s. 114(g)
Penal Code, s. 420

*For the applicant - Bhagwan Singh; M/s Bhagawan Singh & Ridzuan*
*For the respondent - Zabedah Ahmad, DPP*

*Reported by Usha Thiagarajah*

**JUDGMENT**

**Kang Hwee Gee J:**

This is a motion to enlarge the time for filing the petition of appeal moved under s. 310 of the Criminal Procedure Code.

The applicant in this motion was charged with the offence of cheating under s. 420 of the Penal Code at the Sessions Court, Ampang, Selangor. He was tried and convicted by the court upon the charge on 7 September 1998 and sentenced to a term of imprisonment of one year and 1 stroke of the rotan.

Under s. 420 of the Penal Code both the sentence of imprisonment and whipping are the absolute minimum that could be legally imposed. Nevertheless, the Sessions Court allowed a stay of execution pending an appeal to the High Court against both the conviction and sentence.

The applicant by his counsel Mr. Ramasamy filed a notice of appeal the next day, 8 September 1998, but had failed later to file the petition of appeal. He did not disclose in his affidavit precisely under which sub-s. of s. 307 of the Criminal Procedure Code he contravened except to say that his counsel had failed to file the petition of appeal after having filed the notice of appeal.

The supporting affidavits for the motion were far from satisfactory and seemed to have been prepared in haste without setting out properly the salient facts which are required for consideration by the court. For instance it was not disclosed when exactly when the grounds of decision of the sessions court judge was served on his counsel, although it is quite clear that from the date the appeal was filed till the date of the hearing of this motion more than one year had elapsed. In the course of his submission however, Mr.Bhagwan Singh who argued this motion on behalf of the applicant's present counsel, informed the court that from his own enquiry the grounds had been served some six months ago.

Neither did the affidavits supporting the motion contain any particulars of the charge. Nor was the notes of evidence of the trial before the sessions court exhibited. Mr. Bhagwan Singh was contented merely to hand over to the court informally a bundle of the notes and grounds of decision which he said was obtained from the sessions court. He had since the last adjournment, also affirmed an affidavit in support of the motion, stating therein the grounds of the proposed petition of appeal.

In order that the substance of this motion may be understood in its proper perspective it is necessary that I set out verbatim the relevant paragraphs of the two affidavits supporting this motion – of the applicant Saw Chiew Choy himself and of his present counsel Mr. Ravichandran.

The relevant paragraphs of the affidavit of Saw Chiew Choy read as follows:

1. Saya ialah Tertuduh di dalam kes di Mahkamah Sesyen di Ampang di Selangor dalam kes Tangkap No. 62-31-94.

2. Saya telah ditangkap dan dituduh di Mahkamah Sesyen di Ampang di atas tuduhan menipu iaitu satu kesalahan di bawah Seksyen 420 Kanun Keseksaan.

3. Pada 7.9.98 saya dijatuhkan hukuman 1 tahun penjara dan disebat sekali dengan rotan oleh Hakim Mahkamah Sesyen di Ampang alas kesalahan di bawah Seksyen 420 Kanun Keseksaan.

4. Saya telah melantik Encik Ramasamy dan firma Tetuan Salleh & Associates jadi peguam dan tahun 1994 dan bayaran guaman telah pun diberi untuk mewakili saya di Mahkamah Sesyen serta jumlah keseluruhan bayaran guaman telah pun dijelaskan. Beliau telah mewakili saya di Mahkamah Sesyen sehingga saya disabitkan dan dihukum.

5. Saya telah mengarahkan peguam Encik Ramasamy untuk buat Rayuan. Saya telah difahamkan bahawa beliau telah menfailkan satu Notis Rayuan dengan nombor 42-27-98 dan penangguhan perlaksanaan hukuman.

6. Sebelum saya terima surat dan Mahkamah saya telah hubungi Encik Ramasamy. Beliau telah beritahu saya jangan susah hati dia akan meneruskan Rayuan saya. Selepas terima surat saya ada hubungi peguam Encik Ramasamy tetapi tak jumpa. Untuk kepentingan keadilan saya terpaksa ambil peguam baru dan lantik Encik Ravichandran untuk mewakili saya.

7. Pada 11.10.99 Mahkamah telah hantar surat bertarikh 4.10.99 kepada saya dan saya terima surat ini pada 15.10.99 pada pukul 3.30 petang di mana setelah baca isi kandungan surat saya terkejut melihat Petisyen Rayuan belum difailkan.

The relevant paragraphs of the affidavit of Mr. Ravichandran read as follows:

1. Saya ialah seorang Peguambela dan Peguamcara di Mahkamah Tinggi Malaya dan adalah Peguambela untuk Pihak Perayu yang dinamakan di atas di dalam prosiding dalam Mahkamah Mulia ini.

2. Saya diberikuasa untuk megikrar Afidavit ini bagi pihak Perayu.

3. Pada 7.9.98 Perayu dijatuhkan hukuman 1 tahun penjara dan disebat sekali dengan rotan oleh Hakim Mahkamah Sesyen di Ampang atas kesalahan di bawah Seksyen 420 Kanun Keseksaan.

4. Pada 8.9.98 Perayu telah menfailkan satu Notis Rayuan kepada Mahkamah Tinggi dengan No. 42-27-98.

5. Firma saya iaitu Tetuan Ravi, Lalitha & Associates telah dilantik oleh Perayu mengendalikan rayuan Perayu di atas. Namun demikian adalah diberitahu bahawa rayuan tersebut telah dibatalkan kerana tempoh masa untuk menfailkan Petisyen Rayuan telahpun tamat. Saya telah meneliti surat daripada Mahkamah dan mendapati bahawa terdapat merit dalam rayuan ini.

6. Rekod Rayuan tidak pernah diserahkan pada pihak Perayu sehingga kini. Oleh yang demikian Perayu tidak diberi notis awal untuk menfailkan Petisyen Rayuan berkaitan dengan kes ini.

7. Saya bersungguh-sungguh menyatakan bahawa untuk kepentingan keadilan Perayu patut dibenarkan menfailkan Petisyen Rayuan dan Mahkamah Mulia ini harus membenarkan Usul ini memandangkan Perayu kini menghadapi perlaksanaan hukuman.

In essence the grounds relied upon by the applicant in this motion are:

(i) that the failure to file the petition of appeal within ten days of having been provided with the grounds of decision and notes of evidence as required under s. 307 of the Criminal Procedure Code was entirely the fault of his former counsel Mr. Ramasamy and,

(ii) that there are merits in his appeal.

The public prosecutor however, did not deem it necessary to file any affidavit in reply. But at the hearing of the motion the learned deputy made it clear in no uncertain terms that she opposed the motion.

***The Law – In Order That Substantial Justice May Be Done In The Matter***

Section 310 of the Criminal Procedure Code reads as follows:

> A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such judge shall consider desirable, in order that substantial justice may be done in the matter.

Suriyadi J in the case of *Ishak Shaari v. PP* [1997] 5 MLJ 28 in dealing with a similar application had correctly stated the law when he said that the court's powers under s. 310, "are purely discretionary and no hard and fast rule should be laid down for its exercise except for the sole purpose of meting out substantial justice", and that "the inadvertence and incompetence of solicitors **could be a ground of consideration** for a judge when exercising his discretion in allowing or disallowing the application."

At first blush one gets the impression that s. 310 of the Penal Code must lean in favour of the applicant – for there could be few such instance that one can think of where it can be said with some justification that "substantial justice" has been done if the applicant is denied the right to pursue his appeal by the dismissal of his motion. Precedents however, indicate that the requirement of s. 307(ix) of the Criminal Procedure Code (stipulating that an appeal shall be deemed to be withdrawn if a petition of appeal is not filed within the time limited) has always been strictly applied and courts are generally reluctant to exercise its power to grant an enlargement of time under s. 310 of the Code unless there are compelling reasons to do so.

The leading case on this aspect of criminal procedure is *Jumari bin Mohamed v. PP* [1982] 1 MLJ 282.

The applicant in that case was found guilty and convicted of two charges of corruption under the Prevention of Corruption Act 1961. He was sentenced to eighteen months' imprisonment on each charge, the sentence to run concurrently. On 12 May 1980 he filed notice of appeal against the said conviction and sentence. On 30 October 1980 the appeal records with the grounds of decision were served on his solicitor. He failed to file his petition of appeal within the required ten days, that is to say by 13 October 1980.

He gave five reasons why he could not file his petition of appeal on time.

First, he said 4 & 5 October 1980 were Saturday and Sunday respectively; second, he said on the 6th of October 1980 his counsel was not free as he was engaged in his duty as a member of the Penang Leglislative Assembly at its sitting on that day; third, he said on 9 October, his counsel was ill; fourth, he said that on 13 October – the last date for filing the petition, his counsel felt that he needed more time to study the notes of evidence before filing the petition; and lastly he said his present counsel was now not the same counsel who appeared for him at the trial so he was not able to study the appeal record closely on 13 October.

Mohamed Azmi J (as he then was), dismissed the application holding that an extension of time to file a Petition of Appeal or to amend such petition out of time should not be granted as a matter of course. The reasons put forward by the applicant, it was held, were too flimsy and frivolous for the court to exercise its discretion under s. 310, Criminal Procedure Code and that in any case there was nothing on record to show that the applicant's conviction was wrongful. In so holding His Lordship considered and approved the dictum of Thompson CJ in *Veerasingam v. PP* [1958] MLJ 76 at 79 that:

> The only fetter which s. 310 places upon the exercise of the discretion which it gives to the judge is that it shall be exercised 'in order that substantial justice may be done'. Clearly, to exercise his discretion properly the judge must exercise his discretion as he sees fit in order that substantial justice may be done in the matter.

However, the catch phrase **'in order that substantial justice may be done in the matter'** in s. 310 of the Code was interpreted in the *Jumari's* case to encompass not merely substantial justice to the convicted person but also substantial justice to **"society at large on whose behalf the Public Prosecutor acts"** – following which it was held on the other side of the coin, that no substantial justice would be done, if the appellant's application were to be allowed in that case.

The same strict approach was applied by Chong Siew Fai J (as he then was) in the Sarawak case of *Jiva anak Nawes v. PP* Criminal Application No KG 7 of 1992 High Court, Kuching, reported in vol. 5, 498 – *Mallal's Digest of Malaysian and Singapore Case Law*.

In that case the applicant had appealed against his conviction in the lower court to the High Court. On 1 July 1992 a copy of the notes of proceedings in the lower court was served on the applicant's counsel, but he failed to lodge the petition of appeal within the ten-day period as required. On 7 August 1992, he applied to the High Court for an extension of time to lodge the petition

of appeal. The applicant's counsel claimed that he could not contact the applicant and by the time he managed to contact the applicant, the time for lodging the petition of appeal had lapsed. He maintained that only when the applicant came to see him only on 3 August 1992 was he able to obtain the applicant's instruction to pursue the appeal.

His Lordship considered the application on the merit and held that:

(1) an extension of time should not be granted as a matter of course;

(2) since a notice of appeal had been lodged in this case, it was reasonable to assume that the applicant's counsel must have been given the instruction to appeal. The instruction to appeal must be presumed to be continuing, and as there was no evidence of any limitation on the instructions to appeal, the authority of the applicant's counsel extended to all matters incidental to the appeal such as the preparing and lodging of the petition of appeal;

(3) the preparation of the petition of appeal is a technical matter which normally does not require the assistance of an accused person. It had not been suggested in this case that the assistance of the applicant was necessary for the preparation of the petition of appeal;

(4) here was no indication in this case that the applicant's conviction was wrongful;

(5) accordingly the reasons given for the application in this case were insufficient and the court would not exercise its discretion under s. 310 of the Code to grant the relief sought.

There are reasons in my view why in the first place the strict approach as adopted in the two cases ought to be applied to require due compliance with the Criminal Procedure Code. If an appellant is allowed to say that his failure to lodge his petition of appeal within the time stipulated is due to the default of his counsel, it would be relatively easy for him to avoid the strict provision of s. 307 of the Criminal Procedure Code by merely putting the blame on his counsel. It must be understood by all those who are involved in the administration of criminal justice that a verdict pronounced by a court of law at first instance is for all intents and purposes a finality. The presumption of innocence of a person accused of an offence ends with his conviction. He is now a guilty and convicted person who must be punished without further delay. But in civilised societies where the liberty of the subject is paramount, it is generally recognised that the condemned should be afforded the opportunity to have his conviction reviewed by a higher court – but not before certain

stringent conditions are imposed with respect to the time within which the appellant is obliged to prosecute his appeal to ensure that his liability to submit to punishment without delay is not compromised.

In our jurisdiction this obligation is clearly spelled out in s. 307 of the Criminal Procedure Code (infra). The time limit of ten days set under different circumstances in the sub-sections and in such details underlines the mandatory nature of the obligations being imposed upon the convicted. Thus under sub-s. (ix) it is spelled out clearly that if a petition of appeal is not lodged within the time prescribed, the appeal shall be deemed to have been withdrawn and the trial court shall enforce its sentence or order if any stay of execution has been granted. The tenor of the sub-section clearly underscores the fact that time is of the essence and is meant to be followed to the letter. For effects, I shall reproduce the section verbatim:

307. Procedure for appeal.

(i) Except in any case to which section 304 applies and subject to the provisions of sections 305 and 306 any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence by lodging, within ten days from the time of the judgment, sentence or order being passed or made, with the clerk of the Magistrate's Court a notice of appeal in triplicate addressed to the High Court and by paying at the same time the prescribed appeal fee.

(ii) Every notice of appeal shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate.

(iii) When a notice of appeal has been lodged the Court appealed from shall make a signed copy of the grounds of decision in the case and cause it to be served upon the appellant or his advocate by leaving the said copy at the address mentioned in the notice of appeal or by posting it by registered post addressed to the appellant at the said address.

(iv) Within ten days after the copy of the grounds of decision has been served as provided in subsection (3), the appellant shall lodge with the clerk of the Magistrate's Court at which the trial was held a petition of appeal in triplicate addressed to the High Court.

(v) If the appellant within the period provided in subsection (1) for lodging his notice of appeal has applied for a copy of the notes of the evidence recorded by the Magistrate at his trial he shall lodge his petition of appeal as provided in subsection (4)

(a) within the period provided by such subsection; or

(b) within a period of ten days from the date when a notice is left at his address for service specified in subsection (2) that a copy of the notes of evidence can be had free of charge, whichever period shall be the longer.

(vi) Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred

(vii) (a) If the appellant is in prison he shall be deemed to have complied with the requirements of this section if he gives to the officer in charge of the prison either orally or in writing notice of appeal and the particulars required to be included in the petition of appeal within the times prescribed by this section and pays the prescribed appeal fee.

(b) Such officer shall immediately forward the notice and petition or the purport thereof together with the appeal fee to the clerk of the Magistrate's Court at which the trial was held

(viii) In the case of an appeal by the Public Prosecutor no fee shall be payable.

(ix) If a petition of appeal is not lodged within the time prescribed by this section the appeal shall be deemed to have been withdrawn and the trial Court shall enforce its sentence or order if any stay of execution has been granted, but nothing herein contained shall be deemed to limit or restrict the powers conferred upon a Judge by section 310.

***The Substantial Justice In The Instant Case***

As a first principle, a person who had appointed a counsel to act for him in a court of law should not be heard later to say that he ought to be excused from his counsel's act or omission. It is trite that when a person retains a counsel to act for him, under agency law, the acts of his counsel is imputed on to him. Courts are therefore generally reluctant to excuse the fault of a counsel for a party's non compliance of procedure against the interest of the other party. Thus in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223, in dealing with an appeal against the decision of the High Court disallowing an application to set aside a judgment in default of defence wherein one of the grounds put forth was the inadvertence of counsel to enter the defence to the plaintiffs claim, Gopal Sri Ram JCA was prompted to say at p. 230:

> Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 at p 490, per VC George JCA. But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.

There is of course much substance in the submission of counsel for the appellant that on the other hand "substantial injustice" may result in genuine cases where the neglect to file the grounds within the stipulated time was entirely due to the negligence of his counsel. That was why, he submitted, Suriadi J in the *Ishak bin Shaari* case *(supra)* had to rule that the default of counsel could be a ground for consideration.

But all that his Lordship said in that case was that it could be a ground for consideration. He did not say that it was a ground at all costs. In order that substantial justice could be done in the matter, it would be necessary in my view to adopt a stringent approach to accept the default of counsel as an excuse only when one could be absolutely certain that the applicant was completely free from blame.

Having considered the submission of counsel over the objection of the learned deputy public prosecutor in the instant motion, I find that the claim in his affidavit without condescending to particulars, purporting to blame his previous counsel Mr. Ramasamy for the failure to file the petition of appeal, is wholly inadequate to convince me that he was entirely blameless. Rather the averment lends itself to the suspicion that the applicant may not be stating the truth – that in all probability there may be other reason or reasons which the applicant has failed to disclose.

The best person to verify the fact under the circumstances is Mr. Ramasamy himself. The applicant's bare averment (again without condescending to particulars) in para. 6 of the affidavit that he was unable to find Mr. Ramasamy, is unacceptable. Rather, the failure to obtain from Mr. Ramasamy a deposition to verify the appellant's claim, leaves open the question whether Mr. Ramasamy knew of any other reason which may not be in favour of the applicant.

Before I leave the issue, I need to deal with Mr. Bhagwan's novel contention raised in the course of his submission – that since the Public Prosecutor had

not filed any affidavit in opposition to the applicant's motion whatever that was said in the latter's affidavit, should be accepted as the truth, and therefore this motion should be allowed. He relied on the following passage in the judgment of Abdul Wahab Patail J in *Kesavan Senderan v. PP* [1999] 1 CLJ 343 at 355:

> The basic approach then is as follows. The sworn testimony of a witness is *prima facie* evidence. The court accepts and acts upon that evidence if it is not challenged since failure to challenge means the other party accepts it. If that part of the evidence is not accepted, that party must challenge it in cross-examination.

His Lordship in that case was actually speaking of parole evidence given by a witness in a trial but the same principle applies to affidavit evidence, as Shanker J (as he then was ) in *Overseas Investment Pty Ltd v. Anthony William O' Brien & Anor* [1988] 3 MLJ 332 said at p. 333:

> The plaintiff attached these goods and had them sold on the basis that the goods belonged to the defendant. But what evidence was there to support that contention? None whatsoever except the say-so of the plaintiff's solicitors in the writ of seizure and sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted: see *Tynte v. Buller* [1854] 23 LJ Ch 504; 2 WR 309 (refd). At the hearing, the claimant's oral evidence that she was the sole owner of the goods was also unchallenged.

The principle in *Overseas Investment* is well established and I am in no position to disagree. But there is no question of applying the principle here as there is clearly no such contest of affidavits between the applicant and the Public Prosecutor in this motion. It was the applicant who was desirous of having the time for filing his petition of appeal extended. It follows therefore the onus is solely upon him to satisfy the court that 'substantial justice' requires that his motion be granted, whether or not the public prosecutor files any affidavit to oppose. It is clear therefore there is absolutely no merit in this submission.

But quite apart from the question of blameworthiness, it is clear to me that there is a contumelious delay on the part of the appellant to pursue his appeal. Over one year had passed since he filed his appeal and assuming that Mr Bhagwan Singh's statement from the bar is correct, more than six months since the grounds of decision was supplied. Again his claim in para. 6 of his affidavit that his former counsel Mr. Ramasamy had told him not to worry about his appeal just before he came to know from the sessions court that

his petition of appeal had not been filed remains a bare assertion and is insufficient to support his claim that he had been diligent in pursuing his appeal.

Finally, having perused through the bundle containing the notes of evidence and the grounds of decision of the learned sessions judge supplied by Mr. Bhagwan Singh I am convinced that there is hardly any merit in the appeal. Even if the applicant's motion is allowed he is unlikely to succeed in his appeal as there were certainly enough materials for the learned Sessions Court judge to convict the appellant.

In substance the charge against the appellant was that he had used a forged Mbf credit card to obtained goods from the shop called Dynamic Cane Furnishing. He was charged under s. 420 of the Penal Code for having deceived the employee of the shop to hand over to him the goods by using the said card.

The employee in question, a salesgirl called Foong Yew Kum (PW10) gave evidence that she transacted the purchase by the appellant of the goods (a dog carving, a fish carving and a dining table set charging up the total sum of RM9,330). The appellant paid for the merchandise by using the Mbf credit card purportedly issued to one M. V. Tan. It was clear from the evidence of the witness Mohd Faiz Ong (PW5) the executive officer of Mbf Card Services that the credit card was not issued to the appellant and neither did it belong to the person M.W. Tan, whose name was imprinted on the card.

The appellant was positively identified as the person who made the purchase by the salesgirl Foong Yew Kam as well as by another salesgirl Foo Yoon Chin (PW11) from whom he later purchased some fabric which he paid for by cash. Foo Yoon Chin was able to identify the appellant with certainty as she had spent some moment of time with the appellant in the course of the purchase – the identification parade conducted by the police later after the accused's arrest being therefore a mere formality.

The appellant denied he had made the purchase using the forged credit card as alleged. He blamed another person called Chee Soo Kiat who was arrested later together with him by the police. The said Chee Soo Kiat according to him had asked him to collect the furniture from the shop and that he was arrested shortly after the goods were loaded on to the lorry.

This story was rejected by the learned Sessions Court judge – and rightly so – for the evidence that he had purchased the merchandise alone and in his own right was clearly overwhelming. That evidence did not only come from

the mouth of the salesgirl Foong Yew Kum who had attended to him with respect to the purchase of the items using the credit card but also from the salesgirl Foo Yoon Chin who attended to him with respect to the cash purchase of the fabric. At no time was the person Chee Soo Kiat ever present when the purchases were made.

The only point of substance that requires some deliberation in the trial before the sessions court was the fact that Chee Soo Kiat was not called by the prosecution to give evidence – an issue canvassed before the learned Sessions Court judge by the applicant's counsel who urged the court to invoke an adverse presumption under s. 114(g) of the Evidence Act 1950.

The said Chee Soo Kiat it is clear to all at the trial was arrested together with the accused. But it was also clear that he was uninvolved in the unfolding of the narrative in the case for the prosecution or for that matter in the case for the defence and therefore need not be called to give evidence. The authority for this proposition is the Federal Court case of *Ti Chuee Hiang v. PP* [1995] 2 MLJ 433, wherein at p. 438 Edgar Joseph Jr speaking for the panel said:

> We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.
>
> On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v. PP* [1956] MLJ 194). That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v. Oliva* [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v. R* [1936] 3 All ER 36 at p. 49, applied in *R v. Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

To put it in another perspective – Chee Soo Kiat was not a witness who could provide the prosecution or the defence with any material evidence of the commission of the offence by the appellant. His presence it was clear, would not make the case for the prosecution any stronger and neither would his absence afford the appellant the benefit of a reasonable doubt. It follows therefore that no adverse inference could be legitimately drawn against the failure of the prosecution to call this witness.

Be that as it may, the grounds of decision of the learned Sessions Court's judge shows that she had duly considered the submission of counsel for the applicant on the failure of the prosecution to call Chee Soo Kiat as a witness. She was of the view (which she was perfectly entitled to), that sufficient effort had been made by the police to trace this witness but in vain. She concluded rightly, that no adverse inference can be drawn against the prosecution – for was it not Mohamed Azmi SCJ in *Munusamy v. PP* [1987] 1 MLJ 492 who said at p. 494, that an adverse presumption may only be invoked against the prosecution when there was a deliberate withholding of evidence?

The motion must be dismissed.